

If transactions for the licensing of computer software meet all of the criteria provided in Section 130.1935(a)(1), neither the transfer of the software or the subsequent software updates will be subject to Retailers' Occupation Tax. (This is a GIL).

October 22, 2002

Dear Xxxxx:

This letter is in response to your letter received August 6, 2002. The nature of your letter and the information you have provided require that we respond with a General Information Letter, which is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120(b) and (c), which can be found on the Department's website at www.revenue.state.il.us/Laws/regs/part1200/.

In your letter, you have stated and made inquiry as follows:

On April 25, 2002, AAA sent the enclosed request for a determination of whether our licensing agreement with BBB is exempt from Illinois Sales Tax. BBB is one of our corporate licensing customers in Illinois, BBB has provided AAA with a copy of Illinois Regulation, Sec 130.1935, and BBB has requested that AAA not charge BBB for the sales tax regarding the software licensing orders during September 2, 2001 through March 2002.

Statement of Facts

AAA is in the business of developing and licensing database software to customers around the world. We are located in CITY/STATE and our software is shipped directly to customers. Enclosed please find a copy of the BBB purchase order, the Master Volume License Agreement, and the Amendment to Master Volume License Agreement. The 628 quantity stated on the order is the number of authorized users at BBB that are licensed to use AAA software.

BBB claims that the orders placed under the amended agreement are exempt from Illinois Sales Tax, because the amended agreement meets all five requirements stated in Sec. 130.1935(a)(1).

- A. It is evidenced by a written agreement signed by the licensor and the customer.
- B. It restricts the customer's duplication and use of the software.
- C. It prohibits the customer from licensing, sublicensing or transferring the software to a third party (except to a related party).
- D. The vendor will provide another copy at minimal or no charge if the customer loses or damages the software, and

- E. The customer must destroy or return all copies of the software to the vendor at the end of the license period.

Issues

Unfortunately, the explanations we received in the letter dated July 18, 2002 were not clear and specific and not qualified as a PLR. Our two specific questions are:

- 1) **If AAA software is "canned" software and our license agreement meets all the requirements in Sec. 130.1935(a)(1), parts A through E, then is our transaction subject to Illinois Sales Tax? Stated another way, is the exemption from sales tax described in Sec. 130.1935(a)(1) only available for "custom" software or does it also apply to "canned" software that meets the Sec. 130.1935(a)(1) requirements?**
- 2) **AAA entered into the original agreement with BBB on September 28, 2001, and the agreement was amended on March 29, 2002. Your letter dated July 18, 2002 stated that the effect of the amendment cannot be determined in that letter, so please confirm whether the transactions under the original and/or the *amended* agreement are exempt from sales tax under Sec. 130.1935(a)(1).**

We request a PLR to resolve the tax issues with BBB since BBB has refused to pay AAA for the sales tax we have billed them on the invoices. AAA has submitted such taxes to the Illinois Department of Revenue on our tax returns during those periods, and AAA is not under an audit or pending litigation with the Illinois Department.

We would appreciate if Illinois Legal Counsel could accelerate your response on this PLR so we can resolve the tax issue with BBB as soon as possible. We have already been waiting for 3 months, but unfortunately the first general letter did not provide a clear and concise resolution of the issues.

Enclosed please also see the properly executed power of attorney. To the best of our knowledge, AAA is not under an audit or pending litigation with IL Department, and the above information is true and correct. To the best of our knowledge, the department has not previously ruled on the same issue for AAA. AAA considers the enclosed Master Volume License Agreement, Amendment, and purchase order to be trade secret information and we request that this information be deleted from the publicly disseminated version of the private letter ruling.

If you have any questions or need further information, please contact us. Thanks in advance for your help.

86 Ill. Adm. Code 130.1935, Computer Software, has been recently amended. See enclosed revised copy of Section 130.1935. Generally, sales of "canned" computer software are taxable retail sales in Illinois. However, if the computer software consists of custom computer programs, then the sales of such software may not be taxable retail sales. See Section 130.1935(c).

Custom computer programs or software are prepared to the special order of the customer. The selection of pre-written or canned programs assembled by vendors into software packages does

not constitute custom software unless real and substantial changes are made to the programs or creation of program interfacing logic. See Section 130.1935(c)(3).

If transactions for the licensing of computer software meet all of the criteria provided in Section 130.1935(a)(1), neither the transfer of the software or the subsequent software updates will be subject to Retailers' Occupation Tax. A license of software is not a taxable retail sale if:

- A) It is evidenced by a written agreement signed by the licensor and the customer;
- B) It restricts the customer's duplication and use of the software;
- C) It prohibits the customer from licensing, sublicensing or transferring the software to a third party (except to a related party) without the permission and continued control of the licensor;
- D) The licensor has a policy of providing another copy at minimal or no charge if the customer loses or damages the software, or permitting the licensee to make and keep an archival copy, and such policy is either stated in the license agreement, supported by the licensor's books and records, or supported by a notarized statement made under penalties of perjury by the licensor; and
- E) The customer must destroy or return all copies of the software to the licensor at the end of the license period. This provision is deemed to be met, in the case of a perpetual license, without being set forth in the license agreement.

The provisions of Section 130.1935 apply to both canned and custom software if the software meets the requirements of the regulation. Any software sold pursuant to the Master Agreement is subject to tax. The Master Volume License Agreement does not meet the requirements of 130.1935. The Amendment to the Master Volume License Agreement does meet all of the requirements of 130.1935. Any sales of software after the effective date of the Amendment to the Master Volume License Agreement, March 29, 2002, are not subject to tax. However, any sales of software before the effective date of the Amendment to the Master Volume License Agreement are taxable.

I hope this information is helpful. The Department of Revenue maintains a website, which can be accessed at www.revenue.state.il.us. If you have further questions related to the Illinois sales tax laws, please contact the Department's Taxpayer Information Division at (217) 782-3336.

If you are not under audit and you wish to obtain a binding Private Letter Ruling regarding your factual situation, please submit all of the information set out in items 1 through 8 of Section 1200.110(b).

Very truly yours,

Melanie A. Jarvis
Associate Counsel

MAJ:msk
Enc.

